

## CITY COMMISSION MINUTES

May 5, 2009

5:00 p.m.

The special meeting of the Junction City City Commission was held on Tuesday, May 5, 2009 with Mayor Terry Heldstab presiding.

The following members of the Commission were present: Terry Heldstab, Scott Johnson, Mike Rhodes and Ken Talley. Staff present was: City Manager, Rod Barnes, Assistant City Manager, Mike Guinn, City Clerk Tricia Gowen, and City Attorney Catherine Logan.

### NEW BUSINESS

- a. Katie Logan presented an overview of the changes to the Kansas Open Meetings Act and the Kansas Open Records Act.

### ADJOURNMENT

Commissioner Johnson moved, seconded by Commissioner Talley to adjourn at 5:50 p.m. Ayes: Heldstab, Johnson, Rhodes, Talley. Nays: None. Motion Carried.

APPROVED AND ACCEPTED THIS 19<sup>th</sup> DAY OF MAY 2009 AS THE OFFICIAL COPY OF THE JUNCTION CITY CITY SPECIAL COMMISSION MINUTES FOR MAY 5, 2009.

  
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Tricia Gowen, City Clerk

  
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Terry Heldstab, Mayor

## KOMA 2008 Legislation

### 2008 Change KOMA

- ❑ 2008 legislation changed definition of meeting from majority of quorum of the membership of body or agency to a majority of the membership of body or agency.

- ❑ The second amendment made in 2008 added a new section prohibiting "serial meetings."
- ❑ "[M]eetings in a series shall be open if they collectively involve a majority of the membership of the body or agency, share a common topic of discussion concerning the business or affairs of the body or agency, and are intended by any or all of the participants to reach agreement on a matter that would require binding action to be taken by the body or agency."

- ❑ Serial meetings were already ruled by Attorney General Opinion No. 98-26 to be prohibited.
- "In summary, a series of meetings each of which involves less than a majority of a quorum of a public body, but collectively totaling a majority of a quorum, at which there is a common topic of discussion of the business or affairs of that body constitutes a meeting for purposes of the KOMA."

### Two new elements added to what constitutes a "serial meeting" by 2008 legislation

- ❑ Intended by any or all of the participants to reach agreement
- ❑ On a matter that would require binding action to be taken by the body or agency

### When do E-mail and other electronic communications = Meeting?

- ❑ KANSAS KSA 75-4317a
  - "As used in the open meetings act, "meeting" means any gathering or assembly in person or through the use of a telephone or any other medium for interactive communication by a majority of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency.

- ☐ E-mail and other technologies such as text messaging would be considered "interactive communication".
- ☐ AG has confirmed this in numerous opinions.

Concept applies to all forms of electronic communication

- ☐ Chat Rooms & instant messaging
- ☐ Text messaging
- ☐ Other

- ☐ Not all "interactive communications" are prohibited by KOMA
  - "for the purpose of discussing the business or affairs of the body or agency"
- ☐ AG 98-26 appears to approve this form of communication for purely procedural purposes, such as specifying agenda items.

Other States "meeting" definitions

- ☐ Can be a finding of requirement of simultaneous communications for emails for similar technologies such as messaging to constitute a meeting.
- ☐ Wisconsin and VA, found that email communications among governing body member which were not simultaneous or nearly so is less like a telephone conference call more like exchange of letters and replies, and found not a "meeting" under those statutes.

KS – "simultaneous" analysis is moot.

- ☐ Noted above, since 2008 KOMA expressly prohibits "Serial Meetings"
  - AG Opinion 98-49: e-mail, when it constitutes serial communication – could be considered a meeting under KOMA.
  - AG Opinion 98-26: Interactive communications do not need to be in "real time", only mutual

Note that under 2008 serial meetings prohibition, there are 5 elements (2 new):

- ☐ series of meetings
- ☐ collectively involves majority
- ☐ business and affairs
- ☐ intended by any or all to reach an agreement.
- ☐ on a matter that would require binding action.

- ☐ Public entities should develop policies and procedures to govern electronic communications to insure do not violate KOMA
- ☐ Educate staff and elected officials.

## KORA Email Policies

### KORA and Electronic Records

- ☐ "Public record" means any recorded information, regardless of form or characteristics" K.S.A. 45-217
- ☐ See AG Opinion 2002-1
  - \* Electronic records, including email, are potentially subject to KORA

### Exceptions

- ☐ Records owned by a private person OR entity not related to functions, activities, programs or operations funded by public funds.
- ☐ Records kept by individual legislators or members of the governing body. KSA 45-217(g)(1).

### AG Opinion 2002-1 as to second exception in context of email:

- ☐ If a specific email is not made, maintained or kept by the city, but rather is exclusively made, maintained or kept only by the individual members of the governing body, it is not a public record. [BUT might still violate KOMA]

### "Electronic Records" extremely broad term. Far more than email.

- ☐ Case law developing. A 2009 Arizona Court ruled "metadata" requested in a public record request was not a "public record" under Arizona statute.
- ☐ "Each time a government employee logs on or off of a computer, clicks a computer mouse, pushes the characters on a keyboard, sends an e-mail, prints a document, uses the internet, talks on a phone, or enters a building with keycard access, a "record" has arguably been generated. ...Thus, an enormous quantity of records, in numerous forms, is created each day in Arizona as a result of government operations. Simply because the records exist, however, does not mean that they fall, or necessarily should fall, within the definition of a public record... If the legislature finds it appropriate to declare that metadata falls within the scope of a public record, then the legislature may take the appropriate steps to make that change. Until such time, the public records law does not require the production of metadata in response to a public records request."
- ☐ Lake v. City of Phoenix, 547 Ariz. Adv. Rep. 14 (2009)

In the Arizona case, the court notes that due to its definition of "public record" a court in Washington came to a different conclusion:

- ☐ "In O'Neill v. City of Shoreline, a Washington court considered whether specific metadata relating to an e-mail received by a city council member was a public record. 187 P.3d at 824, P 1. The court determined that the metadata requested in that case fell within Washington's broad statutory definition of a public record. Id. at 826-27 & nn.17-18, PP 14, 21 (citing Wash. Rev. Code Ann. § 42.56.010(2)-(3) (West 2008)) (defining a public record as any document, including "data compilations from which information may be obtained or translated," which contains "information relating to the conduct of government . . . owned, used, or retained by any state or local agency regardless of physical form or characteristics.") (emphasis added). Thus, O'Neill is not helpful to our analysis here."

#### E-mail as Electronic Record

- ☐ Email is simply a method of communication.
- ☐ If the content of the Email is covered by KORA, then treated in the same manner as paper communication for purposes of disclosure.
- ☐ Email with content that is covered by the entity's record retention policy should be treated for retention purposes in same manner as paper documents.
- ☐ Similarly, it is the content of email that governs disclosure in a KORA request, i.e. if it is subject to statutory exceptions to openness.

Electronic records which are fluid and not easily converted to a paper record as are emails, consider how to preserve and disclose.

- ☐ Since electronic records such as email are invariably created, stored, filed and deleted in a different manner than paper records, local governments should develop email retention policies to specify what information sent or received by email should be retained and for how long.
- ☐ Simply backing up the e-mail system onto tapes or other media, or purging all messages after a set amount of time are not adequate strategies for managing e-mail.

- ☐ Policy needs to consider and include safeguards in the context of preserving records in matters involving pending or anticipated litigation, and
- ☐ In case of governments, open records requirements.

#### Example of steps to consider [from litigation context]

- ☐ Make sure persons with electronic records subject to retention have instructions for maintenance and understand obligations.
- ☐ IT department programs or operations for preservation and to prevent loss of e-records.
- ☐ Identify persons to answer questions about retention of e-records.
- ☐ Monitor

- ☐ Even if a record retention schedule provides for the destruction or alteration of a record (including an e-mail), if that record is relevant to "pending or reasonably anticipated litigation" it must be preserved as potential evidence in that litigation.

- ☐ Numerous examples but each government entity is unique, and must develop a unique policy for email retention tied to its general document retention policies.